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Erivesto Anderson & Anor v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–18 OF 2003(W)

B

ALAUDDIN CJ (MALAYA), ABDUL AZIZ MOHAMAD AND ZULKEFLI FCJJ

1 AUGUST 2008

C

Evidence — Expert evidence — Chemist's evidence — Chemist giving extensive explanations on analysis and tests carried out — Chemist providing cogent reasons for conclusions — Whether trial judge had properly evaluated evidence of chemist

D

Evidence — Identification evidence — Quality of identification — Witness recognising accused persons as opposed to mere identification — Evidence of witness honest, accurate and subjected to close scrutiny by court — Concurrent findings of facts on identification of accused persons made by trial court and intermediate appellate court — Whether identification of sufficient quality to convict

E

F

Evidence — Identification evidence — Turnbull guidelines — Trial judge not specifically referring to R v Turnbull & Ors — Whether trial judge had followed Turnbull guidelines in his own way

G

The two appellants were charged with one Lawrence and another person still at large, with three counts of murder under s 302 of the Penal Code ('Code') read with s 34 of the Code. At first instance, the High Court convicted all three accused persons on all three charges. On appeal to the Court of Appeal, Lawrence was acquitted and discharged but the convictions of the two appellants were affirmed. The two appellants thus appealed to the Federal Court. In the Federal Court, the judgments of the High Court and Court of Appeal were attacked on the following grounds: (i) the identification of both appellants by PW8 (a witness) was not accurate and the quality of the identification evidence poor; (ii) the trial judge failed to warn himself as per the *Turnbull* directions; (iii) there was no forensic evidence linking the appellants to the murders; and (iv) on the assumption that both the appellants were jointly charged, their guilt ought to be proved individually and separately.

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Held, dismissing the appeals:

(1) PW8's evidence was more of a recognition rather than identification since he had seen both appellants several times before the offences were committed. Both the High Court and Court of Appeal were aware of the importance of having the identity of both appellants positively confirmed. Both courts had subjected the identification evidence to close scrutiny and the first and second appellants had been confirmed as the perpetrators of the offences. The trial judge had accepted the honesty of PW8's evidence and there was no real doubt as to its accuracy. In the instant case, both the High Court and the Court of Appeal had also made concurrent findings of facts with reference to the identification of the appellants and their involvement in the murders (see paras 17, 19, 34 & 53–54).

(2) Although the trial judge may not have alluded to the case of *R v Turnbull & Ors* [1976] 3 All ER 549, he had in his own way, followed the guidelines propounded in that case and held that the quality of the identification evidence remained steadfastly good. There was no doubt that the trial judge had in fact followed the guidelines set out in *R v Turnbull* (see paras 32 & 35).

(3) The chemist — PW21 — had given evidence of DNA analysis he carried out on bloodstains linking the appellants to the murders. He had given extensive explanations on the analysis he had carried out and provided cogent reasons for his conclusions. The trial judge had also properly evaluated the evidence of the chemist (see paras 46–47).

(4) In the instant appeal, the charges preferred against the appellants revealed that they were charged in furtherance of their common intention. The charges were not premised on a joint charge (see paras 50 & 52).

(5) In the instant appeal, apart from the strength of the identification evidence and the evidence of the chemist, there was also other evidence to support the convictions of the appellants. Watches and money taken from the crime scene were recovered from the appellants' apartment (see para 63).

[Bahasa Malaysia summary

Kedua-dua perayu telah dituduh bernama seorang bernama Lawrence manakala seorang lagi masih bebas, dengan tiga pertuduhan membunuh di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama s 34 Kanun. Pada mulanya, Mahkamah Tinggi mensabitkan ketiga-tiga tertuduh untuk ketiga-tiga pertuduhan tersebut. Atas rayuan ke Mahkamah Rayuan, Lawrence telah dibebaskan dan dilepaskan tetapi sabitan terhadap kedua-dua

perayu disahkan. Kedua-dua perayu oleh itu telah merayu ke Mahkamah Persekutuan. Di Mahkamah Persekutuan penghakiman-penghakiman Mahkamah Tinggi dan Mahkamah Rayuan dikritik atas alasan-alasan berikut: (i) pengecaman kedua-dua perayu oleh PW8 (seorang saksi) tidak tepat dan mutu keterangan pengecaman tidak kuat; (ii) hakim perbicaraan telah gagal mengingatkan dirinya seperti dalam arahan-arahan *Turnbull*; (iii) tiada keterangan forensik yang mengaitkan perayu-perayu kepada pembunuhan tersebut; dan (iv) atas andaian bahawa kedua-dua perayu dituduh bersama, kebersalahan mereka patut dibuktikan secara individu dan berasingan.

Diputuskan, menolak rayuan-rayuan:

(1) Keterangan PW8 lebih kepada pengenalan daripada pengecaman memandangkan dia telah melihat kedua-dua perayu beberapa kali sebelum kesalahan-kesalahan tersebut dilakukan. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan sedar tentang kepentingan mengesahkan dengan positif pengenalan perayu-perayu. Kedua-dua mahkamah telah meletakkan keterangan pengecaman tersebut untuk penelitian rapi dan perayu-perayu pertama dan kedua telahpun disahkan sebagai pelaku kesalahan-kesalahan tersebut. Hakim perbicaraan telah menerima kejujuran keterangan PW8 dan tiada keraguan sebenar tentang ketepatannya. Dalam kes ini, kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan juga telah membuat penemuan fakta selaras dengan rujukan kepada pengecaman perayu-perayu dan penglibatan mereka dalam pembunuhan tersebut (lihat perenggan 17, 19, 34 & 53–54).

(2) Meskipun hakim perbicaraan tidak secara langsung menyebut tentang kes *R v Turnbull & Ors* [1976] 3 All ER 549, beliau dalam caranya tersendiri, telah mengikut garis panduan yang dikemukakan dalam kes tersebut dan memutuskan bahawa mutu keterangan pengecaman sesungguhnya tetap baik. Tidak diragui yang hakim perbicaraan sememangnya telah mengikut garis panduan yang ditetapkan dalam *R v Turnbull* (lihat perenggan 32 & 35).

(3) Ahli kimia — PW21 — telah memberikan keterangan untuk analisis DNA yang dilakukannya ke atas kesan darah yang mengaitkan perayu-perayu kepada pembunuhan tersebut. Dia telah memberikan penjelasan terperinci tentang analisis yang dijalankannya dan memberikan sebab-sebab yang meyakinkan untuk kesimpulannya. Hakim perbicaraan juga telah dengan sewajarnya menilai keterangan ahli kimia tersebut (lihat perenggan 46–47).

(4) Dalam rayuan ini, pertuduhan-pertuduhan yang dibuat terhadap perayu-perayu menunjukkan bahawa mereka telah dituduh berdasarkan niat bersama mereka. Pertuduhan-pertuduhan tersebut tidak dibuat atas pertuduhan bersama (lihat perenggan 50 & 52).

(5) Dalam kes ini, selain daripada kekuatan keterangan pengecaman dan keterangan ahli kimia tersebut, terdapat juga keterangan lain bagi menyokong sabitan-sabitan terhadap perayu-perayu. Jam tangan dan wang yang diambil daripada tempat kejadian ditemui daripada pangsapuri perayu-perayu (lihat perenggan 63).]

Notes

For a case on *Turnbull* guidelines, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1722.

For cases on chemist's evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1418–1423.

For cases on quality of identification, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1712–1719.

Cases referred to

Gunalan a/l Ramachandran & Ors v PP [2006] 2 MLJ 197, FC (refd)

Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)

PP v Munusamy [1980] 2 MLJ 133, FC (refd)

R v Turnbull & Ors [1976] 3 All ER 549, CA (folld)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Penal Code ss 34, 302

Appeal from: Criminal Appeal No W-05–46 of 2000 (Court of Appeal)

Collin Sequerah (Amir Hamzah Arshad with him) (Zain & Co) for the first appellant.

Gurbachan Singh (Zain & Co) for the second appellant.

Wong Chiang Kiat (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Alauddin CJ (Malaya):

INTRODUCTION

[1] Both Erivesto Anderson, the first appellant, and Michael Philip, the second appellant, before us were charged together with one Lawrence Osayi Irabor for committing, with another person at large, murder of Yong Seong

Fong (first charge), Yong Seong Fatt (second charge) and Yong How Fei (third charge) punishable under s 302 of the Penal Code ('the Code') read with s 34 of the same code.

[2] At the end of the trial, the learned trial judge found each and every of the three charges had been proven beyond reasonable doubt against all the three persons. They were accordingly convicted on all the three charges of murder.

[3] Being dissatisfied with the said decision all the three persons appealed to the Court of Appeal. The Court of Appeal dismissed the appeal of the first and second appellants and their convictions were duly affirmed. However, the Court of Appeal allowed the appeal of Lawrence Osayi Irabor and he was acquitted and discharged. The respondent had earlier filed an appeal against the decision of the Court of Appeal in allowing the appeal of Lawrence Osayi Irabor but the said appeal was subsequently withdrawn.

[4] The first and second appellants are now appealing to this court against the decision of the Court of Appeal in affirming their convictions as imposed by the High Court.

THE CHARGES

[5] The charges against the first and second appellants read as follows:

(i) Wilayah Persekutuan Perbicaraan Jenayah Bil 45–4 Tahun 1998

Bahawa kamu bersama-sama seorang lagi yang masih bebas pada 20.2.1997 jam lebih kurang 11.15 malam, di kedai No. 432, Tingkat 1, Jalan Tuanku Abdul Rahman, dalam daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur, di dalam meneruskan niat bersama kamu seperti yang ditakrifkan di bawah seksyen 34 Kanun Keseksaan, telah melakukan bunuh dengan menyebabkan kematian terhadap Yong Seong Fong, Kad Pengenalan 561123-10-5815 dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

(ii) Wilayah Persekutuan Perbicaraan Jenayah Bil 45–5 Tahun 1998

Bahawa kamu bersama-sama seorang lagi yang masih bebas, pada 20.2.1997 jam lebih kurang 11.15 malam, di kedai No. 432, Tingkat 1, Jalan Tuanku Abdul Rahman, dalam daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur, di dalam meneruskan niat bersama kamu seperti yang ditakrifkan di bawah seksyen 34 Kanun Keseksaan, telah melakukan bunuh dengan menyebabkan kematian terhadap Yong Seng Fatt, Kad Pengenalan 4660815 dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

(iii) Wilayah Persekutuan Perbicaraan Jenayah Bil 45–6 Tahun 1998

Bahawa kamu bersama-sama seorang lagi yang masih bebas, pada 20.2.1997 jam lebih kurang 11.15 malam, di kedai No. 432, Tingkat 1, Jalan Tuanku Abdul Rahman, dalam daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur, di dalam meneruskan niat bersama kamu seperti yang ditakrifkan di bawah seksyen 34 Kanun Keseksaan, telah melakukan bunuh dengan menyebabkan kematian terhadap Yong How Fei, Kad Pengenalan 780516-14-5789 dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

BACKGROUND FACTS

[6] The salient facts of this case had been fully set out in both the judgments of the learned judge and the Court of Appeal. This appeal involves the callous murder of three persons which took place on the first floor of No 432, Jalan Tuanku Abdul Rahman, Kuala Lumpur.

[7] The event occurred on the night of 20 February 1997 at about 11.15pm when a group of black men were seen entering the beauty saloon located on the first floor of the said premises.

[8] Just then, Yong Seong Fatt (the deceased in the second charge) who was resting in the beauty saloon was set upon and slashed with a chopper. He died as a result of injuries inflicted on him

[9] According to the forensic pathologist, Dr Sharom bin Abdul Wahi (PW28), Yong Seong Fatt suffered multiple incised wounds to the head and neck which had injured the brain and the neck vessels and these wounds were severe and caused his death (see exh P51).

[10] The group of black persons continued their rampage and in a shop selling watches and leather goods, which adjoined the beauty saloon, Goh Kim Soo (PW7), who was totalling up the takings of the day at a table, was set upon and slashed by one of them. Luckily for PW7, she survived the ordeal.

[11] Yong How Fei (the deceased in the third charge), who, according to the learned trial judge, was assisting PW7 in counting the daily takings, was then set upon and slashed by this group of persons. He died that night as a result of the injuries inflicted on him.

[12] According to PW28, Yong How Fei sustained severe multiple incised wounds to the head and neck which injured the brain and neck vessels and

caused his death. His right carotid artery was also severed and the right side of cervical spine C2 x C3 was cut (see exh P52).

[13] The next person who was attacked was Yong Seong Fong (the deceased in the first charge) (also known as Fong Chye to PW8) who was near PW7 and Yong How Fei at that point of time. He was slashed on the head by the first and second appellants with a chopper and died as a result of the injuries sustained.

[14] He had 12 injuries on his head. Four were incised wounds. There was one incised wound measuring 12.5 and 0.5cm, on the back parietal region extending to the left in the occipital area which cut through the skull bone on the back of the right parietal extending down to the left on the lower occipital area measuring 12cm in length and injuring the brain matter underneath (see exh P50).

[15] After Yong Seong Fong was attacked, the next victim was Lam Yin Choy (PW8). He fainted after he was slashed but he survived the attack.

FINDINGS OF THE HIGH COURT

[16] The pertinent part of the findings of the trial judge pertaining to the involvement of the first and second appellants in the murder of Yong Seong Fatt (first deceased), Yong How Fei (second deceased) and Yong Seong Fong (third deceased) could be gleaned from pp 22–23 of the record of appeal (Jilid A). This is what the learned judge said:

> It is appropriate at this stage to state that at the close of the prosecution I accepted the evidence of Lam that it was the second accused and first accused who 'slashed' Yong Seong Fong with a chopper and it was the first accused who 'slashed' him (Lam). The unchallenged evidence was clear from himself and the woman PW7 that the place was brightly lit up. Lam was familiar with the first and second accused: he had seen the first accused in the shop sometimes and he had seen him in the shop earlier that day; he had seen the second accused several times before. The quality of Lam's evidence was very good and my view is that he was not mistaken as to their identity as being the assailants as stated by him in his evidence.
>
> I am mindful that the cross-examination of Lam was to show that while there were several other blacks in the shop and while the first and second accused were also at the shop during the attacks on the various victims the two did not take part in the attacks. The answers given by Lam were unwavering and firm — he stood by his evidence of the roles played by the first accused and the second accused during the attack and was not shaken at all.

[17] It must be noted that the identification of the first and second appellants by Lam (PW8) was more of a recognition rather than

identification as he had seen both of them several times before in the shop. Indeed PW8 confirmed that he had seen the first appellant earlier in the day before the murder.

FINDINGS OF THE COURT OF APPEAL

[18] The Court of Appeal in its judgment subjected the findings of the learned trial judge on the involvement of the first and second appellants in this case to a thorough examination (see pp 14–24 of the record of appeal Jilid B) culminating in the following conclusion (at p 24):

> Having reviewed the reasons and findings of the trial judge on PW8's identification of the first and second appellants we find no flaw in the assessment of the trial judge's finding of fact that PW8 had correctly identified the first and second appellants as the perpetrators of the offence.
>
> Even though the trial judge may not have alluded to the celebrated case of *R v Turnbull* he had in fact, in his own way followed the guidelines propounded in the said case and held that the quality of the identification evidence remained steadfastly good.
>
> The trial judge's assessment of the identification evidence remained so at the end of the defence. To that end we found no reason to disturb the findings of the trial judge.

[19] It could be clearly observed that both the learned trial judge and the Court of Appeal were acutely aware of the importance of having the identity of the first and second appellants positively confirmed. The learned trial judge and the Court of Appeal had subjected the evidence on this issue to close scrutiny and the first and second appellants had been confirmed as the 'perpetrators of the offence'.

THE APPEAL

[20] Before us the judgments of the learned trial judge and the Court of Appeal were attacked on the following grounds:

(1) The learned judges of the Court of Appeal and the trial judge had erred in fact and law in deciding that the identification of the appellants was precise when it was clear from the evidence of PW8 that the quality of the identification of the appellants was flawed and created doubt in the prosecution's case. Furthermore, there was no evidence to support the evidence of PW8 in respect of the identification of the appellants.

(2) The learned judges of the Court of Appeal had erred in fact and law in failing to consider the failure of the learned trial judge to warn himself

of the dangers in relation to identification in accordance with the directions in *R v Turnbull* [1976] 3 All ER 549.

(3) The learned judges of the Court of Appeal had erred in fact and law in failing to consider the grounds of judgment of the learned trial judge which held that there was forensic evidence against the appellants. Indeed, should the evidence be considered properly and in its entirety, it is obvious that there was no forensic evidence tying the appellants to the incident and the learned judge has further misinterpreted the forensic evidence. The chemist (PW21) who gave evidence on behalf of the prosecution gave no explanation to support his opinion.

(4) The learned trial judge had erred in fact and law in deciding that a common intention had been proven by the respondent under s 34 of the Penal Code. Further, premised on the assumption that they were jointly charged, the guilt of the appellants ought to be proven individually and separately.

IDENTIFICATION OF THE FIRST AND SECOND APPELLANTS

[21] As we have said earlier in the judgment on the issue concerning the identification of the first and second appellants by PW8, both the learned trial judge and the Court of Appeal were aware of the importance of having their identity positively confirmed.

[22] The Court of Appeal had specifically dealt with this issue in its judgment (see pp 14–24 of the record of appeal Jilid B). This is what the Court of Appeal said (at p 14):

> In the context of the identification evidence of both these witnesses PW7 and PW8 relating to the first and second appellant much was made by both their respective counsel as regards the quality of the identification evidence, bearing in mind, counsel contended, the extenuating circumstances in which the identification was made as regards both the first and second appellants.
>
> We did bear in mind, that in cases where the evidence against an accused depends wholly or substantially on the correctness of identification of such accused, which the defence alleges to be unreliable, the trial court should warn itself of the specific need for caution before convicting such accused in reliance of the identification. Judges should warn themselves that a witness, or a number of witnesses might make an honest mistake in identification about the presence of an individual at the scene of the crime.

[23] The Court of Appeal continued (at p 15): A

> When deciding on the correctness of identification the trial judge should reflect and perhaps ponder on the length of time the witness had observed such accused, the distance, lighting conditions, whether there was anything to impede or distract his process of observation, and whether the witness had seen such accused previously, and if so what was it that caused him to remember such accused. B

[24] The reproduction of the learned trial judge's judgment pertaining to the identification evidence of PW8 could be seen at pp 16–23 of the judgment of the Court of Appeal. C

[25] Having done that the Court of Appeal concluded thus (at p 24):

> Having reviewed the reasons and findings of the trial judge on PW8's identification of the first and second appellants we find no flaw in the assessment of the trial judge's finding of fact that PW8 had correctly identified the first and second appellant as the perpetrators of the offence ... D
>
> The trial judge's assessment of the identification evidence remained so [that is, steadfastly good] at the end of the defence. To that end we found no reason to disturb the findings of the trial judge. E

[26] The pertinent parts of the learned trial judge's judgment on this issue could be seen at pp 22–23 of the record of appeal Jilid A, the extracts of which were reproduced in extenso by the Court of Appeal and we have also cited the relevant parts in our judgment earlier. F

R v Turnbull & Ors [1976] 3 All ER 549

G

[27] For ease of reference, we reproduce extracts of the judgment of the English Court of Appeal in the above case.

[28] Speaking through Lord Widgery CJ (as he then was) this is what the court said (at p 551): H

> Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases, although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this court, to reduce that number as far as possible. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to the juries in the way indicated in this judgment. I

A First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken ...

[29] Continuing at p 552 the court said:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? ... Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

[30] Continuing further the court said:

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur. …

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification ...

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe.

[31] On the application of the guidelines in *R v Turnbull & Ors* [1976] 3 All ER 549, it is useful at this juncture to refer to the case of *Mohamad Yazri*

Minhat v Public Prosecutor [2003] 2 MLJ 241 at p 245; [2003] 2 CLJ 65 at p 70 wherein the Court of Appeal remarked as follows:

> Now, the English case of *Turnbull* did not lay down any proposition of law embodied in concrete. As all members of the criminal bar are aware, the several propositions in *Turnbull* are known as the '*Turnbull* guidelines'. And that is what they really are. They are just guidelines and each case depends on its own facts. What was said in *Turnbull* does not amount to inflexible rules with no exceptions whatsoever.

[32] Now, as we have stated earlier in the judgment, the Court of Appeal has taken into consideration the fact that even though the trial judge may not have alluded to the celebrated case of *R v Turnbull* he (the trial judge) had in fact, in his own way followed the guidelines propounded in the said case and held that the quality of the identification evidence remained steadfastly good.

[33] With reference to the evidence of PW8 regarding the identification of the first and second appellants this is what the learned trial judge had to say (see pp 22–23 of the record of appeal Jilid A):

> It is appropriate at this stage to state that at the close of the prosecution I accepted the evidence of Lam that it was the second accused and first accused who 'slashed' Yong Seong Fong with a chopper and it was the first accused who 'slashed' him (Lam). The unchallenged evidence was clear from himself and the woman PW7 that the place was brightly lit up. Lam was familiar with the first and second accused; he had seen the first accused in the shop sometimes and he had seen him in the shop earlier that day; he had seen the second accused several times before. The quality of Lam's evidence was very good and my view is that he was not mistaken as to their identity as being the assailants as stated by him in his evidence. … The answers given by Lim were unwavering and firm — he stood by his evidence of the roles played by the first and the second accused during the attack and was not shaken at all.

[34] Given the honesty of Lam's (PW8) identification which the trial judge had accepted, our opinion is that there can be no real doubt about its accuracy.

[35] Taking into consideration the approach taken by the learned trial judge in evaluating this aspect of PW8's evidence we could not entertain any doubt that he had followed the guidelines set out in *R v Turnbull*.

[36] Thus, the same view was taken by the Court of Appeal when it said in its judgment that the learned trial judge had in fact, in his own way followed the guidelines propounded in the said case and held that the quality of the identification evidence remained steadfastly good.

[37] In the circumstances of these appeals we are of the unanimous view that there is no failure or omission on the part of both the learned trial judge and the Court of Appeal to consider the guidelines in *R v Turnbull* as alleged by the first and second appellants.

THE CHEMIST'S EVIDENCE

[38] The evidence of the chemist (PW21), pertaining to the matching of the blood samples of the deceased victims and PW7 with those items recovered from the respective appellants was explained by the learned trial judge in the following manner (see p 29 of the record of appeal Jilid A):

> The evidence of the chemist was that on DNA analysis he found the Genotype HLA-DQ Alpha of the blood stains on T-shirt (P22A) (worn by the first accused when arrested) was that of the blood from P20A (the blood of Anajemba PW1). The DNA analysis of the blood stains on the jeans (worn by the first accused when arrested) revealed the Genotype HLA-DQ Alpha of the blood from P21A (taken from the woman PW7) and of the blood from P39A (taken from the deceased Yong Seong Fong).

[39] In view of the above findings, the Court of Appeal in reviewing the defence raised by the first appellant cited with approval and reproduced that part of the grounds of judgment of the learned trial judge dealing with DNA analysis as follows (see p 30 of the record of appeal Jilid B):

> The first accused's evidence that the blood on his T-shirt had come from his blood (from his bleeding face, nose and legs after he was beaten by the police) and the blood on his jeans had come from blood of the second and third accused again flew in the face of the clear and unchallenged evidence of the government chemist that a DNA analysis of the Genotype HLA-DQ Alpha of the blood shown on the T-shirt was that of the blood of PW1, Anajemba; that the DNA analysis of the blood stains of the jeans found the Genotype HLA-DQ Alpha of the blood of the woman PW7 and of the blood of deceased Yong Seong Fong. It is argued that the DNA results are unreliable since for the genetic locus HLA-DQ Alpha it is possible for others to have the same Genotype and the probabilities of it occurring on one type is 1 in 7 and on the other type 1 in 15 but the short answer to that it is highly improbable for the blood stains found to be coincidentally those of the victims of attacks in the shop.

[40] After having carefully perused the judgment of the learned trial judge, in particular, those critical issues pertaining to the identification of and the defences raised by the first and second appellants, the Court of Appeal arrived at the following conclusion (see p 36 of the record of appeal Jilid B):

> The trial judge before convicting the first and second appellants gave due consideration as to why the defence of the first and second appellants, though could not be believed, did not raise a reasonable doubt in the prosecution's case. We find that the test propounded in *Mat v Public Prosecutor* [1963] MLJ 263 was actually applied by the trial judge.

[41] Under these circumstances the Court of Appeal had no reservation in affirming the convictions of the first and second appellants as imposed by the learned trial judge.

[42] Upon further scrutiny of the chemist's (PW21) evidence we find that he had given extensive explanations on the analysis he had carried out and the reasons for his conclusions (see pp 155–157 of the record of appeal Jilid A).

[43] In the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 214 the Federal Court explained how the evidence of an expert ought to be examined and admitted by the court in the following words:

> In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion. Therefore the nature of DW2's evidence must be examined in the light of the above principles. We see nowhere in the records to suggest that the trial judge had incorrectly or improperly evaluated the evidence of DW2.

[44] It may be useful at this juncture to refer to the evidence of the chemist (PW21) on the analysis he carried out on the various exhibits sent to him. In response to the questions asked he explained as follows:

> Q. The blood of Goh Kim Soo (A13a-P21) and also blood D2a (Yong Seong Fong) was found on jeans B1c (P24A), B1f (RM5 note) (P27b) and also found on short sleeved shirt R1 (P43A)?
>
> A. From the blood groupings and from analysis DNA — based on my analysis, the blood of Goh Kim Soo contained the group and genotype that was found on blood stains on long jean B1c and R1. The blood stains found on B1f — RM5 (P27B) — was probably from Yong Seong Fong or Goh Kim Soo as the genotype was the same but the grouping could not be ascertained. The blood stains on short sleeved shirt (P43A) came from Goh Kim Soo because the blood groupings and genotype were the same.
>
> Q. See A9a (P20A) blood stain of Anajemba Igweilo?
>
> A. It was found on the shirt P22A (B1a) — the blood grouping and genotype were the same.

[45] Having examined the evidence of PW21, particularly as quoted above, the learned trial judge came to the following conclusion:

> The chemist gave careful credible evidence supporting his findings and opinions on the DNA analysis on the blood stains on the tee shirt and jeans seized from the first accused and the shirt which the third accused led to the discovery of and of the RM5 note found in his possession and I accept the evidence of the chemist.

[46] We agree with the findings of the learned trial judge and we disagree that there is no proper evaluation of the evidence of PW21 by the learned trial judge.

[47] We observe that the chemist not only gave detailed explanation on the steps he took in his analysis but also provided cogent reasons for his findings (see p 156 of the record of appeal Jilid A).

THE APPELLANTS WERE JOINTLY CHARGED IN FURTHERANCE OF A COMMON INTENTION

[48] This ground of appeal was put forward through the amended petition of appeal of the first and second appellants which we have allowed earlier before the start of the appeal.

[49] As contended by learned counsel for the appellants this ground of appeal suggests that the guilt of the appellants ought to be proven individually and separately premised on the assumption that they were jointly charged, presumably because of the presence of the words 'Bahawa kamu bersama-sama ...' which appeared in all the charges.

[50] With respect to learned counsel, we note that all the three charges faced by the appellants were premised not on a joint charge but rather on a common intention as clearly revealed in the charges themselves.

[51] The Federal Court in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197 had occasion to consider the same issue. Delivering the judgment of the court Ariffin Zakaria FCJ held as follows (at pp 202–203):

> However, having scrutinised the charge, I am of the view that it was clear that the charge was premised on common intention rather than a joint charge except that the words 'in furtherance of common intention of you all' was missing from the charge. However, I am of the view that this defect in the charge is not fatal as the charge clearly states that it has to be read together with s 34 of the Penal Code, a provision relating to criminal act committed by several persons in furtherance of a common intention.

[52] Indeed, the charges as preferred in this appeal clearly revealed that the

appellants were charged in furtherance of their common intention to commit murder and therefore the issue raised in the final ground of the amended petition of appeal of the appellants herein is, in our view, without basis and devoid of any merits at all.

CONCURRENT FINDINGS OF FACTS

[53] Thus far we have addressed all the issues raised by learned counsel for the appellants in this appeal. However, there is yet another issue of some significance in this appeal which we feel should be mentioned and discussed here. What we mean is the concurrent findings of facts by the learned trial judge and the Court of Appeal.

[54] As we have mentioned earlier in the judgment, the main focus of both the learned trial judge and the Court of Appeal in this appeal concerns the identification of both appellants and their involvement in the murder of the three deceased persons in furtherance of their common intention.

[55] We have reproduced extracts of the judgments of both the learned trial judge and the Court of Appeal which clearly revealed their concurrent findings of facts in particular with reference to the identification of the appellants.

[56] In *Public Prosecutor v Munusamy* [1980] 2 MLJ 133 at p 136, the Federal Court had occasion to deal with the issue of concurrent findings of facts and had this to say:

> As pointed out earlier, the learned magistrate's finding was upheld by the learned appeal judge in his grounds of judgment. We have gone through the evidence thoroughly ourselves and have come to the same conclusion. Where there have been concurrent findings of facts in the lower courts it should not be made a practice in the appeal court to review these concurrent findings of facts unless it is shown there was no evidence to support the inferences drawn in the lower courts. Two Privy Council cases are relevant on this point. the first is *Wong Thin Yit v Mohamed Ali* where in the short judgment Lord Diplock said that it was not the practice of the Privy Council to review concurrent findings of facts from courts in Malaysia and dismissed the appeal. In *Hitam bin Abdullah v Kok Foong Yee (f) & Anor*, this point was dealt with in slightly more depth by Sir Harry Gibbs. In his judgment His Lordship emphasised that 'it is very well established that as a general rule, Their Lordships' board will decline to interfere with the concurrent findings of two courts on a pure question of fact'.

[57] Indeed we find that there is no infirmity whatsoever in their concurrent findings of facts concerning the identification of the appellants

and their direct roles in the killing of Yong Seong Fong and the slashing of PW8 on that fateful night of 20 February 1997.

[58] We reproduce below that part of the evidence of PW8 (see p 103 of the record of appeal Jilid A).

Q. What can you remember about the first accused on the night of the incident?

A. I was the last person being slashed.

Q. What is the role played by the first accused in the incident from the start?

A. He slashed people.

Q. Who did you see him slash?

A. He slashed my boss Fong Chye. After that he slashed me.

Q. At that time he slashed your boss what did he have?

A. He used a chopper.

Q. When he pulled you out what did he do to you?

A. He slashed me.

Q. Did you see him slash anyone else?

A. I had fainted and I did not see anything.

Q. Did you see him slash anyone else apart from Fong Chye before you fainted?

A. No

Q. What did you see second accused do?

A. I saw second accused slash my boss Fong Chye.

[59] PW8 continued with his evidence by explaining the sequence of events which took place on the night of the incident and the crucial moment when Fong Chye (Yong Seong Fong) was slashed. This is what he said in evidence (see p 105 of the record of appeal Jilid A):

Q. Who dropped the chopper?

A. The second accused dropped his chopper.

Q. You said earlier first accused chop boss Fong Chye and you said second accused slashed Fong Chye first?

A. Both of them together slashed Fong Chye.

Q. Slashed simultaneously?

A. At the same time.

OTHER EVIDENCE

[60] Apart from the identification or rather the recognition of the first and second appellants by PW8, there are also other evidence which connected them and supported their roles in the killing of Yong Seong Fong and the slashing of PW8.

[61] The DNA analysis of the blood stains found on the first appellant's jeans showed the Genotype HLA-DQ Alpha of the blood of PW7 who was slashed on the night of the incident and also the blood of the deceased Yong Seong Fong.

[62] The blood stains found on the T-shirt worn by the first appellant was found to be that of PW1, Anajemba, who was also injured by this group of persons on the night of the incident.

[63] Notwithstanding the strength of the identification of the first and second appellants by PW8 together with the chemist's evidence, the conviction of the appellants by the learned trial judge which was later confirmed by the Court of Appeal was further supported by the evidence of recovery of watches and money in various denominations taken from the shop and found in the appellants' apartment.

CONCLUSION

[64] Based on the foregoing reasons it is our respectful view that the Court of Appeal was right in affirming the convictions of the first and second appellants for the murder of Yong Seong Fatt, Yong How Fei and Yong Seong Fong on the night of 20 February 1997 at the first floor of 432, Jalan Tuanku Abdul Rahman, Kuala Lumpur.

[65] In the result, we do not think that it can be said that the verdict in this case was in any way unsafe or unsatisfactory and these appeals against conviction are therefore dismissed.

[66] The conviction and sentence by the Court of Appeal are hereby upheld.

Appeals dismissed.

Reported by Andrew Christopher Simon